



FEDERAL ELECTION COMMISSION
Washington, DC 20463

NOV 19 2009

VIA FACSIMILE AND
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Chris Van Hollen, Chairman
Democratic Congressional Campaign Committee
430 South Capitol, SE
Washington, DC 20003

RE: MUR 5996
Education Finance Reform Group
Tim Bee for Congress and David Katsel
in his official capacity as treasurer

Dear Chairman Van Hollen:

This is in reference to the complaint filed by the Democratic Congressional Campaign Committee with the Federal Election Commission on April 15, 2008, against Tim Bee for Congress and David Katsel, in his official capacity as treasurer ("the Committee"), and the Education Finance Reform Group ("EFRG") concerning an advertisement referencing Tim Bee. Based on that complaint and available information, including the responses to the complaint, on October 20, 2009, the Commission found no reason to believe that EFRG violated 2 U.S.C. §§ 433, 434(b) or 441d, provisions of the Federal Election Campaign Act of 1971, as amended. The Commission also decided to dismiss the allegation that EFRG and the Committee coordinated the advertisement and closed the file in this matter. The Factual and Legal Analyses explaining the Commission's decision is enclosed.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8).

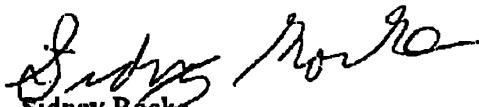
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Hon. Chris Van Hollen
MUR 5996
Page 2

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
General Counsel

BY: 
Sidney Locke
Assistant General Counsel

Enclosure
Factual and Legal Analyses (2)

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENT:** Tim Bee for Congress and David Katsel, MUR: 5996
4 in his official capacity as treasurer
5

6 **I. INTRODUCTION**

7 This matter was generated by a complaint filed with the Federal Election Commission
8 ("the Commission") by the Democratic Congressional Campaign Committee. The complaint
9 alleges that a 2008 television advertisement financed by Education Finance Reform Group
10 ("EFRG"), a group formed by local Arizona school districts to lobby on state education issues,
11 expressly advocated the election of Tim Bee, a candidate for the House in Arizona's 8th
12 Congressional District. Complainant maintains that the advertisement constituted an excessive
13 and prohibited in-kind contribution to Bee's principal campaign committee, Tim Bee for
14 Congress ("the Committee"), based on its belief that EFRG was a corporation and that the ad
15 was coordinated between EFRG and Bee.¹

16 As discussed below, the Commission exercises its prosecutorial discretion and dismisses
17 the coordinated communication allegations as to Tim Bee and the Committee. *See Heckler v.*
18 *Chaney*, 470 U.S. 821, 831 (1985).

19 **II. FACTUAL AND LEGAL ANALYSIS**

20 **A. Factual Summary**

21 Information obtained by the Commission indicates that EFRG is an unincorporated group
22 of 16 local school districts formed through an inter-governmental agreement to lobby the
23 Arizona legislature for changes in teacher performance pay. *See also* Daniel Scarpinato, *Tax*

¹ The complaint makes its allegations against "an unnamed organization" but cites to a newspaper article in a footnote that identified the organization as EFRG. Information obtained by the Commission confirms that EFRG financed the ad.

Dollars Fund 30-Second TV Spot Lauding Bee, Arizona Daily Star (April 8, 2008), available at 2008 WLNR 7328636 ("Scarpinato, *Tax Dollars*"). The information also indicates that a primary outcome of the two-year-old group's efforts was to help pass Senate Bill 1488, legislation sponsored by state senator Tim Bee, who was a sitting state senator when he became a candidate in the primary election for the U.S. House of Representatives.² Senate Bill 1488 concerned a Teacher Performance Pay Program. *Id.* Following passage of the legislation in the state senate on March 20, 2008, EFRG began airing an ad on or around March 28, 2008 on selected cable television stations in the 8th Congressional District. *Scarpinato, Tax Dollars*; Complaint at 2. According to the Arizona State Legislature website, at the time the ad aired, Senate Bill 1488 was pending in two state house committees.

A transcript of the ad (hereinafter "the ad" or *Thank You*), including a description of the video, is as follows:

<u>Audio</u>	<u>Visual</u>
Thank you, Senator Bee	Film footage of Tom Murphy, board member, Sahuarita School District
Senator Bee, I would like to thank you as a parent for your continued support of education.	Film footage of Kris Ham, parent, Sahuarita School District
Thank you, Senator Bee, for supporting students in southern Arizona.	Film footage of Richard Connet, President, Vail Education Association
Narrator: Senate Bill 1488 sponsored by Senate President Tim Bee . . .	Footage of Bee apparently taped from television with 3/4/08 date in corner of frame and chyron reading: "SB 1488 schools; teacher performance pay programs," "Senate appropriations"

² The Arizona primary was held on September 2, 2008. After notifying the Commission in September 2007 that he was exploring a run for the House and designating an exploratory committee, Bee filed a Statement of Candidacy and a Statement of Organization on January 25, 2008. News articles appearing at the time the ad began airing presumed, correctly, that Bee would face the incumbent Democrat, Gabrielle Giffords, in the general election.

... will level the playing field so that all teachers in southern Arizona will receive greater pay for performance.	Footage of Bee outdoors in a discussion with several people, including individuals featured in the ad
Narrator: The Tucson Citizen stated "Bee's bill, supported by school districts, parents, teachers, and advocates of education would allow all districts to participate."	Excerpts quoting from two newspaper articles published in "The Tucson Citizen"
Narrator: Tim Bee: Fighting for fairness for southern Arizona.	Picture of Tim Bee next to text: "Tim Bee" "Senate Bill 1488" "Fighting for Fairness for Southern Arizona"
Thank you, Senator Bee.	Film footage of two female elementary school-aged children

Following public attention about the financing of what appeared to be a political ad with taxpayer dollars, the cable company reportedly pulled the ad on or about April 8, in part so that the ad sponsor could be identified. Scarpinato, *Tax Dollars*. The following day, EFRG announced that it had cancelled the ad because a state house committee had approved the bill and because the ad was being perceived as a move against the Democratic incumbent in the 8th Congressional District. Scarpinato, *Schools Group Pulls Ad That Supports Bee*, Arizona Daily Star (April 10, 2008), available at <http://www.azstarnet.com/sn/printDS/233730> ("Scarpinato, *Schools Group*"). Hours later, Bee called for the ad to be removed in a public statement. *Id.* An unspecified portion of the \$16,000 EFRG reportedly paid for the ad was expected to be refunded. *Id.*

B. Analysis

1. Coordination Allegations

Under the Federal Election Campaign Act of 1971, as amended ("the Act"), an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" constitutes an

in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate's authorized committee, or agent of either when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than a candidate, the candidate, committee, or an agent of either; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d).

The payment for a coordinated communication is an in-kind contribution to the candidate or his or her authorized committee with whom it was coordinated. See 11 C.F.R. § 109.21(b)(1). Further, the in-kind contribution will be considered received and accepted by the candidate or his or her authorized committee and must be reported as an expenditure made by the candidate or his or her authorized committee under certain circumstances. See 11 C.F.R. § 109.21(b)(1) and (2).

a. **The Payment Prong**

EFRG paid for *Thank You*. Therefore, the payment prong of 11 C.F.R. § 109.21(a)(1) is satisfied.

b. **The Content Prong**

At all times relevant to this matter, the content prong was satisfied if the communication at issue met at least one of four content standards. Only two apply here: (1) a public communication that republished, disseminated, or distributed, in whole or part, a candidate's campaign materials; and (2) a public communication that contained express advocacy. See 11 C.F.R. § 109.21(c)(2) and (3). Neither of the other two content standards – electioneering communications and 90-day pre-election public communications – is implicated because the ad

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aired more than five months before the September primary election, well outside the time frames covered by those standards. *See* 2 U.S.C. § 109.21(c)(1) and (4).³

(i). Express Advocacy

The complaint contends that *Thank You* expressly advocated Tim Bee's election pursuant to 11 C.F.R. § 100.22(b), which if true, would satisfy the content prong of the coordinated communication rules.

Section 11 C.F.R. § 100.22(b) provides that "expressly advocating" means any communication that—

When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

The complaint relies on a number of external events to support its assertion that a reasonable person could not interpret the ad as anything other than advocating the election or defeat of a clearly identified Federal candidate. It asserts that the ad aired "in the midst of a heated [congressional] campaign" in the 8th Congressional District and argues that it cannot reasonably be viewed as an effort to thank Bee for his work on SB 1488 because the bill had already passed the state senate when the ad was broadcast. Complaint at 2. It also states that an

³ The U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. *See Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

1 individual who appeared in the ad admitted to a reporter that “[w]e all knew it was going to be
2 used also for his run against [the Democratic incumbent] Giffords.” *Id.*, citing to Scarpinato, *Tax*
3 *Dollars*. The individual quoted by the reporter was a teacher in one of the school districts
4 participating in EFRG.

5 Respondents deny that the ad expressly advocated Bee's election to Congress and assert
6 that the ad advocated an issue. Committee Response at 2.

7 *Thank You* may be reasonably interpreted as having a meaning other than expressly
8 advocating Bee's election to federal office. No candidacy or federal election is mentioned in the
9 ad. It does not explicitly praise Bee's character, qualifications, or accomplishments in a context
10 that has no other reasonable meaning than to encourage actions to elect or defeat Bee. *See e.g.*,
11 Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures:
12 Explanation and Justification, 60 Fed. Reg. 35292, 35295 (July 6, 1995). The single issue at the
13 center of *Thank You* was legislative in nature, focusing on education, and more specifically, SB
14 1488, a bill that Bee had sponsored in the state senate that had an integral connection to the
15 school districts who participated in EFRG. Moreover, the ad began airing soon after the
16 successful state senate vote on the legislation and at the same time state house committees were
17 considering it, well before Arizona's September primary and the November general elections.

18 Based on these facts, *Thank You* does not contain an “electoral portion” that is
19 “unmistakable, unambiguous, and suggestive of only one meaning;” rather, reasonable minds
20 could differ as to whether the ad encourages electoral or some other action. *See*, 11 C.F.R. §
21 100.22(b). Therefore, we conclude that *Thank You* does not expressly advocate Tim Bee's
22 election to Congress. *See* MUR 5779/5805 (City of Santa Clarita)(banners thanking a U.S.
23 Representative for a specific piece of legislation did not expressly advocate his election because

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they could be reasonably interpreted as messages advocating passage of the legislation and thanking the legislator for sponsoring it).

(ii). **Republication**

An examination of the *Thank You* video found on the internet raises an issue as to whether the ad satisfied the republication standard of the content prong in 11 C.F.R. § 109.21(c)(2). A frame towards the end of the 30-second ad that appears on screen for two seconds contained a photo of Bee next to text that read, "Tim Bee, Senate Bill 1488," and above the "Fighting for Fairness for Southern Arizona" phrase. As noted, *supra*, the Bee photo in *Thank You* is identical to a "head shot" photo of Bee that appeared on the home page of the Committee's website. The photo was also available as a high resolution download in the "Media Kit" section of the site. Although we do not have any information about whether EFRG obtained the photo from the campaign website, given the website's display of the photo and its invitation to download it, it is possible that the Bee photo used in *Thank You* was originally generated by the Committee.

The content standard set forth in 11 C.F.R. § 109.21(c)(2), includes, subject to several exceptions not applicable in this matter, the republication of campaign material, in whole or in part, prepared by a candidate or his or her authorized committee in a public communication. Public communications include television advertisements that are disseminated via broadcast, cable or satellite. *See*, 2 U.S.C. § 431(22).

Previously, the Commission dismissed a complaint involving the alleged republication of campaign photographs in third-party mailers. *See* MUR 5743 (Betty Sutton for Congress/Emily's List). *See also* Statement of Reasons in MUR 5743 (Commissioners Weintraub and Von Spakovsky) (concluding that the downloading of photos from a candidate's unrestricted website

1 for incidental use in a mailer independently created and financed by a third party does not
2 constitute republication and is not an in-kind contribution).

3 In this matter, the "head shot" photo, which was identical to a "head shot" photo
4 available for public download on the Tim Bee for Congress Internet website, appeared briefly
5 toward the end of a 30 second television advertisement. The Commission was unable to agree
6 on whether the use of the "head shot" in this matter constituted republication; however, because
7 the "head shot" photo was publicly available for download at no charge from the campaign's
8 website and was a small portion of the television advertisement at issue, the Commission voted
9 to exercise its prosecutorial discretion and dismiss the allegation that EFRG made or Tim Bee for
10 Congress accepted an excessive or prohibited contribution in the form of a coordinated
11 communication.⁴ *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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⁴ Because the Commission voted to dismiss the allegation with respect to the content prong, there is no need to reach the final prong of the test, the conduct prong.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENT:** Education Finance Reform Group **MUR:** 5996

4
5
6 **I. INTRODUCTION**

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8 This matter was generated by a complaint filed with the Federal Election Commission
9 ("the Commission") by the Democratic Congressional Campaign Committee. The complaint
10 alleges that a 2008 television advertisement financed by Education Finance Reform Group
11 ("EFRG"), a group formed by local Arizona school districts to lobby on state education issues,
12 expressly advocated the election of Tim Bee, a candidate for the House in Arizona's 8th
13 Congressional District. Complainant maintains that the advertisement constituted an excessive
14 and prohibited in-kind contribution to Bee's principal campaign committee, Tim Bee for
15 Congress ("the Committee"), based on its belief that EFRG was a corporation and that the ad
16 was coordinated between EFRG and Bee.¹ The complaint further alleges that EFRG failed to
17 register and report as a political committee despite spending more than \$16,000 to finance the ad,
18 and that it failed to include the requisite disclaimer on the ad.

19 As discussed below, the Commission exercises its prosecutorial discretion and dismisses
20 the allegation that EFRG made an excessive or prohibited contribution to Tim Bee for Congress
21 in the form of a coordinated communication. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

22 With respect to the allegations that EFRG was a political committee, there is no reason to
23 believe that EFRG violated 2 U.S.C. §§ 433 and 434 by failing to register or report as a political
24 committee because there is no information, other than the cost of the ad which we conclude is

¹ The complaint makes its allegations against "an unnamed organization" but cites to a newspaper article in a footnote that identified the organization as EFRG. EFRG confirmed that it financed the ad. EFRG Response at 1.

1 not an expenditure, that potentially would count towards the \$1,000 statutory threshold, and the
2 available information is not sufficient to suggest that EFRG's major purpose was the nomination
3 or election of a federal candidate.

4 Finally, there is no reason to believe that EFRG violated 2 U.S.C. § 441d(a) by failing to
5 include a disclaimer on its advertisement because EFRG does not appear to be a political
6 committee and the ad does not expressly advocate Tim Bee's election.

7 **II. FACTUAL AND LEGAL ANALYSIS**

8 **A. Factual Summary**

9 EFRG is an unincorporated group of 16 local school districts formed
10 through an inter-governmental agreement to lobby the Arizona legislature for changes in
11 teacher performance pay. EFRG Response at 2; Daniel Scarpinato, *Tax Dollars Fund 30-Second*
12 *TV Spot Lauding Bee*, Arizona Daily Star (April 8, 2008), available at 2008 WLNR 7328636
13 ("Scarpinato, *Tax Dollars*"). A primary outcome of the two-year-old group's efforts was to help
14 pass Senate Bill 1488, legislation sponsored by state senator Tim Bee, who was a sitting state
15 senator when he became a candidate in the primary election for the U.S. House of
16 Representatives.² Senate Bill 1488 concerned a Teacher Performance Pay Program. EFRG
17 Response at 2. Following passage of the legislation in the state senate on March 20, 2008, EFRG
18 began airing an ad on or around March 28, 2008 on selected cable television stations in the 8th
19 Congressional District. Scarpinato, *Tax Dollars*; Complaint at 2. According to the Arizona State

² The Arizona primary was held on September 2, 2008. After notifying the Commission in September 2007 that he was exploring a run for the House and designating an exploratory committee, Bee filed a Statement of Candidacy and a Statement of Organization on January 25, 2008. News articles appearing at the time the ad began airing presumed, correctly, that Bee would face the incumbent Democrat, Gabrielle Giffords, in the general election.

1 Legislature website, at the time the ad aired, Senate Bill 1488 was pending in two state house
2 committees.

3 A transcript of the ad (hereinafter "the ad" or *Thank You*), including a description
4 of the video, is as follows:
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<u>Audio</u>	<u>Visual</u>
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Senator Bec, I would like to thank you as a parent for your continued support of education.	Film footage of Kris Ham, parent, Sahuarita School District
Thank you, Senator Bee, for supporting students in southern Arizona.	Film footage of Richard Connet, President, Vail Education Association
Narrator: Senate Bill 1488 sponsored by Senate President Tim Bee . . .	Footage of Bec apparently taped from television with 3/4/08 date in corner of frame and chyron reading: "SB 1488 schools; teacher performance pay programs," "Senate appropriations"
. . . will level the playing field so that all teachers in southern Arizona will receive greater pay for performance.	Footage of Bee outdoors in a discussion with several people, including some of those featured in the ad
Narrator: The Tucson Citizen stated "Bee's bill, supported by school districts, parents, teachers, and advocates of education would allow all districts to participate."	Excerpts quoting from two newspaper articles published in "The Tucson Citizen"
Narrator: Tim Bee: Fighting for fairness for southern Arizona.	Picture of Tim Bee next to text: "Tim Bee" "Senate Bill 1488" "Fighting for Fairness for Southern Arizona"
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8 Following public attention about the financing of what appeared to be a political ad with
9 taxpayer dollars, the cable company reportedly pulled the ad on or about April 8, in part so that
10 the ad sponsor could be identified. Scarpinato, *Tax Dollars*. The following day, EFRG
11 announced that it had cancelled the ad because a state house committee had approved the bill and

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1 because the ad was being perceived as a move against the Democratic incumbent in the 8th
2 Congressional District. Scarpinato, *Schools Group Pulls Ad That Supports Bee*, Arizona Daily
3 Star (April 10, 2008), available at <http://www.azstarnet.com/sn/printDS/233730> ("Scarpinato,
4 *School Group*"). Hours later, Bee called for the ad to be removed in a public statement. *Id.* An
5 unspecified portion of the \$16,000 EFRG paid for the ad was expected to be refunded. *Id.*

6 **B. Analysis**

7 **1. Coordination Allegations**

8
9 Under the Federal Election Campaign Act of 1971, as amended ("the Act"), an
10 expenditure made by any person "in cooperation, consultation, or concert, with, or at the request
11 or suggestion of, a candidate, his authorized political committees or their agents" constitutes an
12 in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a
13 candidate, a candidate's authorized committee, or agent of either when the communication
14 satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid
15 for by a person other than a candidate, the candidate, committee, or an agent of either; (2) the
16 communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c);
17 and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R.
18 § 109.21(d).

19 The payment for a coordinated communication is an in-kind contribution to the candidate
20 or his or her authorized committee with whom it was coordinated. *See* 11 C.F.R. § 109.21(b).
21 Further, the in-kind contribution will be considered received and accepted by the candidate or his
22 or her authorized committee and must be reported as an expenditure made by the candidate or his
23 or her authorized committee under certain circumstances. *See* 11 C.F.R. § 109.21(b)(1) and (2).

1 a. **The Payment Prong**

2 EFRG admits that it paid for *Thank You*. EFRG Response at 1. Therefore, the payment
3 prong of 11 C.F.R. § 109.21(a)(1) is satisfied.

4 b. **The Content Prong**

5 At all times relevant to this matter, the content prong was satisfied if the communication
6 at issue met at least one of four content standards. Only two apply here: (1) a public
7 communication that republished, disseminated, or distributed, in whole or part, a candidate's
8 campaign materials; and (2) a public communication that contained express advocacy. *See*
9 11 C.F.R. § 109.21(c)(2) and (3). Neither of the other two content standards – electioneering
10 communications and 90-day pre-election public communications – is implicated because the ad
11 aired more than five months before the September primary election, well outside the time frames
12 covered by those standards. *See* 11 C.F.R. § 109.21(c)(1) and (4).³

13 (i). **Express Advocacy**

14 The complaint contends that *Thank You* expressly advocated Tim Bee's election pursuant
15 to 11 C.F.R. § 100.22(b), which if true, would satisfy the content prong of the coordinated
16 communication rules.

17 Section 11 C.F.R. § 100.22(b) provides that "expressly advocating" means any
18 communication that—

³ The U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. *See Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

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1 When taken as a whole and with limited reference to external events,
2 such as the proximity to the election, could only be interpreted by a reasonable
3 person as containing advocacy of the election or defeat of one or more clearly identified
4 candidate(s) because—

5 (1) The electoral portion of the communication is unmistakable, unambiguous,
6 and suggestive of only one meaning; and

7 (2) Reasonable minds could not differ as to whether it encourages actions to elect
8 or defeat one or more clearly identified candidate(s) or encourages
9 some other kind of action.

10 The complaint relies on a number of external events to support its assertion that a
11 reasonable person could not interpret the ad as anything other than advocating the election of a
12 clearly identified Federal candidate. It asserts that the ad aired “in the midst of a heated
13 [congressional] campaign” in the 8th Congressional District and argues that it cannot reasonably
14 be viewed as an effort to thank Bee for his work on SB 1488 because the bill had already passed
15 the state senate when the ad was broadcast. Complaint at 2. It also states that an individual who
16 appeared in the ad admitted to a reporter that “[w]e all knew it was going to be used also for his
17 run against [the Democratic incumbent] Giffords.” *Id.*, citing to Scarpinato, *Tax Dollars*. The
18 individual quoted by the reporter was a teacher in one of the school districts participating in
19 EFRG.

20 Respondent denies that the ad expressly advocated Bee’s election to Congress and asserts
21 that the ad advocated an issue. EFRG Response at 1, 3-4. EFRG states that the ad was meant to
22 advance the lobbying effort for SB 1488 which was headed to the state House of
23 Representatives, to increase public awareness and support for the bill, and to thank Bee for his
24 sponsorship of it. EFRG Response at 2. It argues that the ad does not contain an “electoral
25 portion” as referenced in Section 100.22(b) and disputes that an ad thanking Bee for sponsoring a
26 specific piece of legislation could only be interpreted as expressly advocating the election of Tim

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1 Bee to Congress. *Id.* at 3-4. Finally, EFRG contends that the complaint improperly relies on
2 external events in its application of 11 C.F.R. § 100.22(b).

3 *Thank You* may be reasonably interpreted as having a meaning other than expressly
4 advocating Bee's election to federal office. No candidacy or federal election is mentioned in the
5 ad. It does not explicitly praise Bee's character, qualifications, or accomplishments in a context
6 that has no other reasonable meaning than to encourage actions to elect or defeat Bee. *See e.g.*,
7 Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures:
8 Explanation and Justification, 60 Fed. Reg. 35292, 35295 (July 6, 1995). The single issue at the
9 center of *Thank You* was legislative in nature, focusing on education, and more specifically, SB
10 1488, a bill that Bee had sponsored in the state senate that had an integral connection to the
11 school districts who participated in EFRG. Moreover, the ad began airing soon after the
12 successful state senate vote on the legislation and at the same time state house committees were
13 considering it, well before Arizona's September primary and the November general elections.

14 Based on these facts, *Thank You* does not contain an "electoral portion" that is
15 "unmistakable, unambiguous, and suggestive of only one meaning"; rather, reasonable minds
16 could differ as to whether it encourages electoral or some other action. *See* 11 C.F.R. §
17 100.22(b). Therefore, we conclude that *Thank You* does not expressly advocate Tim Bee's
18 election to Congress. *See* MUR 5779/5805 (City of Santa Clarita) (banners thanking a U.S.
19 Representative for a specific piece of legislation did not expressly advocate his election because
20 they could be reasonably interpreted as messages advocating passage of the legislation and
21 thanking the legislator for sponsoring it).

(ii). **Republication**

An examination of the *Thank You* video found on the internet raises an issue as to whether the ad satisfied the republication standard of the content prong in 11 C.F.R. § 109.21(c)(2). A frame towards the end of the 30-second ad that appears on screen for two seconds contains a photo of Bee next to text that reads, "Tim Bee, Senate Bill 1488," and above the "Fighting for Fairness for Southern Arizona" phrase. The Bee photo in *Thank You* is identical to a "head shot" photo of Bee that appeared on the home page of the Committee's website. The photo was also available as a high resolution download in the "Media Kit" section of the website. Although we do not have any information about whether EFRG obtained the photo from the campaign website, given the website's display of the photo and its invitation to download it, it is possible that the Bee photo used in *Thank You* was originally generated by the Committee.

The content standard set forth in 11 C.F.R. § 109.21(c)(2) includes, subject to several exceptions not applicable in this matter, the republication of campaign material, in whole or in part, prepared by a candidate or his or her authorized committee in a public communication. Public communications include television advertisements that are disseminated via broadcast, cable or satellite. *See* 2 U.S.C. § 431(22).

Previously, the Commission dismissed a complaint involving the alleged republication of campaign photographs in third-party mailers. *See* MUR 5743 (Betty Sutton for Congress/Emily's List). *See also* Statement of Reasons in MUR 5743 (Commissioners Weintraub and Von Spakovsky) (concluding that the downloading of photos from a candidate's unrestricted website for incidental use in a mailer independently created and financed by a third party does not constitute republication and is not an in-kind contribution).

1 In this matter, the "head shot" photo, which was identical to a "head shot" photo
2 available for public download on the Tim Bee for Congress Internet website, appeared briefly
3 toward the end of a 30 second television advertisement. The Commission was unable to agree
4 on whether the use of the "head shot" in this matter constituted republication; however, because
5 the "head shot" photo was publicly available for download at no charge from the campaign's
6 website and was a small portion of the television advertisement at issue, the Commission voted
7 to exercise its prosecutorial discretion and dismiss the allegation that EFRG made an excessive
8 or prohibited contribution to Tim Bee for Congress in the form of a coordinated communication.⁴
9 See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

10 **2. EFRG Does Not Appear to Be a Political Committee**

11 The complaint maintains that EFRG is a political committee because it made
12 expenditures in excess of \$1,000 for *Thank You*, thereby meeting the statutory threshold required
13 for political committee status under 2 U.S.C. § 431(4)(A). It further points to EFRG's spending
14 on the ad as evidence that EFRG "appears to have as its major purpose the nomination or
15 election of a federal candidate." Complaint at 3.

16 The Act defines a "political committee" as any . . . association, or other group of persons
17 that receives "contributions" or makes "expenditures" for the purpose of influencing a federal
18 election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). To
19 address constitutional overbreadth concerns, the U.S. Supreme Court has held that only
20 organizations whose major purpose is the nomination or election of a federal candidate can
21 potentially qualify as political committees under the Act. See, e.g., *Buckley v. Valeo*, 424 U.S. 1,

⁴ Because the Commission voted to dismiss the allegation with respect to the content prong, there is no need to reach the final prong of the test, the conduct prong.

79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (“*MCFL*”). The Commission has interpreted that test as limited to organizations whose major purpose is federal campaign activity (*i.e.*, the nomination or election of a federal candidate). See Supplemental Explanation and Justification, *Political Committee Status*, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007)(“*Political Cmte. Supp. E&J*”).

The complaint provides no information suggesting that EFRG may have made contributions or expenditures beyond its suggestion that spending for *Thank You* constituted express advocacy. As noted above, we conclude that *Thank You* is not express advocacy and, thus, is not an expenditure. Moreover, the available information does not suggest that EFRG’s major purpose was the nomination or election of a federal candidate.

An organization’s “major purpose” may be established through public statements of its purpose and through sufficient spending on Federal campaign activity. See *Political Cmte. Supp. E&J* at 5601-5602. EFRG does not appear to have made any public statements regarding its purpose. As for its spending, according to a news report, EFRG reportedly received \$194,000 in funds from its participating members and spent \$124,528 on a lobbying firm since its formation about two years ago. See Scarpinato, *Schools Group*, *supra*. The only specific EFRG spending of which we are aware other than *Thank You* are two mailings that EFRG attached to its response. EFRG Response at 3 and Attachment D thereto. These mailings thank another state senator for her efforts on SB 1488, the legislation at the center of *Thank You*, and do not constitute any federal campaign activity, let alone sufficient spending on federal campaign activity.

Accordingly, there is no reason to believe that EFRG violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee.

1 3. No Disclaimer was Required to be Placed on *Thank You*

2 The Act requires a political committee that makes a disbursement to finance, *inter alia*, a
3 television advertisement, to place a disclaimer on it. 2 U.S.C. § 441d(a). It also requires
4 disclaimers on all public political advertising financed by any person that expressly advocates
5 the election or defeat of a candidate. *Id.* Because EFRG is not a political committee and *Thank*
6 *You* does not expressly advocate Bec's election, there is no reason to believe that EFRG violated
7 2 U.S.C. § 441d.

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